

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANGELA B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C20-1617 RSM

**ORDER REVERSING THE
COMMISSIONER'S FINAL
DECISION AND REMANDING
FOR FURTHER
ADMINISTRATIVE
PROCEEDINGS**

Plaintiff appeals denial of her applications for Supplemental Security Income and Disability Insurance Benefits. Plaintiff contends the ALJ erred by discounting her testimony and three medical sources' opinions, accepting another medical source's opinion, and determining Plaintiff could perform three jobs. Dkt. 18. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff is 41 years old, has a limited education, and has worked as a computer equipment operator and an injection molding machine operator. Dkt. 16, Admin. Transcript (Tr.) 1103. Plaintiff applied for benefits in March 2015, alleging disability as of April 25, 2014. Tr.

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1 1089. Plaintiff's applications were denied initially, on reconsideration, and in a 2018 ALJ
2 decision after hearings in 2017 and 2018. Tr. 1089, 13-32. On appeal to this Court, the Court
3 reversed the ALJ's decision and remanded for reconsideration of the medical opinion evidence
4 and Plaintiff's testimony. Tr. 1229-47.

5 On remand, after the ALJ conducted a hearing in July 2020, the ALJ issued a decision
6 finding Plaintiff not disabled. Tr. 1089-1105, 1114-41. The ALJ found Plaintiff had severe
7 spinal impairment(s), hip impairment(s), carpal tunnel syndrome, fibromyalgia, sleep apnea,
8 obesity, mood disorder(s), anxiety disorder(s) (including post-traumatic stress disorder),
9 personality disorder(s), and substance use disorder(s). Tr. 1092. The ALJ found Plaintiff had
10 the residual functional capacity (RFC) to perform simple, routine, light-exertion work with
11 additional social and manipulative limitations. Tr. 1094. The ALJ found that, while Plaintiff
12 could not perform her past relevant work, she could perform other work, such as jobs as a
13 housekeeping cleaner, cafeteria attendant, or outside deliverer. Tr. 1102-04.

14 DISCUSSION

15 This Court may set aside the Commissioner's denial of Social Security benefits only if
16 the ALJ's decision is based on legal error or not supported by substantial evidence in the record
17 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

18 A. Plaintiff's Testimony

19 Where, as here, an ALJ determines a claimant has presented objective medical evidence
20 establishing underlying impairments that could cause the symptoms alleged, and there is no
21 affirmative evidence of malingering, the ALJ can only discount the claimant's testimony as to
22 symptom severity by providing "specific, clear, and convincing" reasons supported by
23 substantial evidence. *Trevizo*, 871 F.3d at 678.

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1 The ALJ discounted Plaintiff's testimony of disabling physical and mental limitations
2 based on ability to work with the same impairments, inconsistent statements, conflict with
3 medical evidence, lack of treatment, and conflict with activities. Tr. 1095-2000.

4 The ALJ's finding that Plaintiff worked with the same impairments was not supported by
5 substantial evidence. The ALJ found Plaintiff's hand pain and tingling began by 2010. Tr. 1095
6 (citing Tr. 676, 801). However, the 2015 records the ALJ cited show Plaintiff's "symptoms have
7 become worse over the past few months." Tr. 676; Tr. 801 ("symptoms have progressed ... over
8 the past several months"). The ALJ also cited reports of anxiety in 2012, but nothing
9 comparable to Plaintiff's testimony of isolating herself and crying spells. Tr. 1095 (citing Tr.
10 903-09), Tr. 1123-27. And the ALJ's finding that Plaintiff "reported severe depression and
11 anxiety, with a need to take daytime naps" in 2013 relies on a mischaracterization of the record.
12 Tr. 1095 (citing Tr. 761-64). In the record cited, Plaintiff reported "[f]amily conflict," not severe
13 depression and anxiety, and, when describing her activities of daily living, stated she took naps
14 while her baby napped. Tr. 761. Again, this is not comparable to Plaintiff's testimony after the
15 alleged onset date. An ALJ may not reject evidence based on an inaccurate portrayal of the
16 record. *See Reddick v. Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (ALJ's decision
17 unsupported by substantial evidence where his "paraphrasing of record material is not entirely
18 accurate regarding the content or tone of the record"). Ability to work with the same
19 impairments was not a clear and convincing reason to discount Plaintiff's testimony.

20 The Commissioner argues the ALJ cited "inconsistencies in why Plaintiff stopped
21 working, sought treatment, and whether or not treatment was effective" but fails to identify such
22 inconsistencies. Dkt. 22 at 4. The ALJ cited records stating Plaintiff left her last job because she
23 "was not able to perform" or because "her depression got worse," but these are not inconsistent.

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1 Tr. 542, 601.¹ The ALJ cited treatment notes from times when Plaintiff's pain was well
2 controlled and times when it was uncontrolled. Tr. 1096; *see also* Tr. 1097 (ALJ found Plaintiff
3 "occasionally" reported pain was controlled). This appears to show variability over time rather
4 than contradictory statements. Inconsistent statements were not a clear and convincing reason to
5 discount Plaintiff's testimony.

6 An ALJ may reject a claimant's testimony based on contradiction with the medical
7 record, but not mere lack of supporting medical evidence. *Carmickle v. Comm'r, Soc. Sec.*
8 *Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
9 2005). Here, the ALJ cited treatment notes documenting observations such as normal mood and
10 affect, but also observations Plaintiff was "teary." Tr. 549. Normal mood and affect did not
11 contradict Plaintiff's mental symptom testimony of self-isolation and crying spells. Similarly,
12 the ALJ cited a mix of abnormal and normal physical findings, such as spinal tenderness and
13 degenerative changes, but negative straight leg raise test. Tr. 1096. While some of these
14 findings may not support Plaintiff's testimony, none contradict it. Contradiction with medical
15 evidence was not a clear and convincing reason to discount Plaintiff's testimony.

16 The ALJ found Plaintiff had "no documented treatment during her period of work
17 activity in 2013 and 2014," prior to the alleged onset date, but failed to explain how this had any
18 bearing on her testimony related to the period after her alleged onset date. Tr. 1095.

19 The ALJ found Plaintiff had "minimal" pain treatment after 2017 and no carpal tunnel
20 treatment after May 2019. Tr. 1097. "[A]n unexplained, or inadequately explained, failure to
21

22 ¹ The ALJ also stated Plaintiff "appears to have voluntarily left work in April 2014 in order to seek
23 disability benefits," but provided no supporting citation to the record, and the Court can find none. Tr. 1095.

1 seek treatment” can constitute a sufficient reason for discrediting a claimant’s symptom
 2 testimony. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff fails to address the ALJ’s
 3 finding. This lack of treatment was a clear and convincing reason to discount Plaintiff’s
 4 testimony of debilitating pain after 2017, but not earlier.

5 An ALJ may discount a claimant’s testimony based on daily activities that either
 6 contradict her testimony or that meet the threshold for transferable work skills. *Orn v. Astrue*,
 7 495 F.3d 625, 639 (9th Cir. 2007). Here, the ALJ found Plaintiff’s activities of caring for several
 8 children and her mother and traveling out of state contradicted her testimony. Tr. 1099-2000.
 9 While caretaking did not contradict Plaintiff’s testimony, her travel activities provided a clear
 10 and convincing reason to discount her mental symptom testimony.

11 Although Plaintiff cared for her four children and at times another child, all but one were
 12 teenagers and adults who took care of their own needs and in fact helped Plaintiff with cooking,
 13 shopping, and housework. Tr. 86, 93, 108.² She got her five-year-old son ready for school, but
 14 her older children helped with that when she was unable. Tr. 91, 108. The ALJ failed to identify
 15 any childcare activities that contradicted Plaintiff’s physical or mental symptom testimony.

16 The ALJ’s finding that Plaintiff’s care for her mother contradicted her testimony was
 17 unsupported by substantial evidence. Plaintiff testified her caretaking consisted of taking her
 18 mother to medical appointments. Tr. 92; *see also* Tr. 1558 (“takes mother to all her many
 19 medical appointments”). Plaintiff testified she provides “emotional support” for her mother, but
 20 does “not take care of her in any way of physically.” Tr. 110, 112. The ALJ failed to identify
 21 any contradictory evidence in the record. Treatment notes show Plaintiff reported her mother

22
 23 ² Plaintiff’s counsel is reminded to provide citations to the record to support factual assertions. *See, e.g.*,
 Dkt. 18 at 10 (“her children are old enough to essentially take care of themselves”).

1 had “brain tumors” but was “quite functional.” Tr. 1731. Plaintiff “expressed worry and
2 concern” over her mother’s health condition, but neither the ALJ nor the Commissioner
3 identifies any caretaking activities that contradicted Plaintiff’s testimony. Tr. 1555.

4 Plaintiff’s travel activities, however, conflicted with her mental symptom testimony. At
5 the 2017 hearing, Plaintiff testified she took a family trip to Disneyland for about a week, and
6 flew to her brother’s house in Arizona for two weeks. Tr. 88-90. The ALJ reasonably found a
7 week-long trip to Disneyland contradicted Plaintiff’s testimony that depression causes her to
8 retreat to her bedroom three days a week. *See* Tr. 106.

9 Plaintiff’s arguments to the contrary are unavailing. Plaintiff argues she has trouble
10 interacting with others, “which is not necessary in a theme park.” Dkt. 18 at 11. Plaintiff’s
11 assertion that a week-long visit to a theme park requires no interaction with others finds no
12 support in the record. The ALJ reasonably inferred Plaintiff interacted with people, such as
13 ticket-sellers, hotel staff, vendors, or other visitors, during the Disneyland trip. *See Batson v.*
14 *Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004) (“[T]he Commissioner’s
15 findings are upheld if supported by inferences reasonably drawn from the record.”). Plaintiff
16 next argues there was “no indication that these trips were not mentally difficult for [her].” Dkt.
17 18 at 11. But there is no indication the trip did cause her difficulty, and her ability to
18 successfully complete the trip contradicts her testimony of needing to isolate frequently.
19 Plaintiff also argues “no concentration or pace maintenance [was] expected.” Dkt. 18 at 11. But
20 an ALJ may discount a claimant’s testimony based on activities that *either* contradict her
21 testimony *or* show transferable work skills. *Orn*, 495 F.3d at 639. The ALJ did not err by
22 finding Plaintiff’s ability to take a week-long Disneyland trip contradicted her testimony of
23 extreme isolation. Plaintiff asserts having her family with her “attenuate[d] her mental

1 limitations.” Dkt. 18 at 11. There is no support in the record for Plaintiff’s assertion. In fact,
 2 therapy notes indicate family issues were her biggest stressor. *See, e.g.*, Tr. 1492 (“discussed
 3 depression issues in relation to family issues”), 1535 (focus of therapy session was “family and
 4 parenting issues”), 1551 (“mother is giving her a ‘hard time.’”). Conflict with Plaintiff’s
 5 activities was a clear and convincing reason to discount her mental symptom testimony.

6 The Court concludes the ALJ did not err by discounting Plaintiff’s mental symptom
 7 testimony, and her physical symptom testimony for the time after 2017. However, the ALJ erred
 8 by discounting her physical symptom testimony before then without a clear and convincing
 9 reason.

10 **B. Medical Opinion Evidence**

11 A treating physician’s opinion is generally entitled to greater weight than an examining
 12 physician’s opinion, and an examining physician’s opinion is entitled to greater weight than a
 13 non-examining physician’s opinion. *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014). An
 14 ALJ may only reject the contradicted opinion of a treating or examining doctor by giving
 15 “specific and legitimate” reasons. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). An
 16 ALJ “may reject the opinion of a non-examining physician by reference to specific evidence in
 17 the medical record.” *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998). An ALJ may
 18 reject the opinion of a non-acceptable medical source, such as an occupational therapist, by
 19 giving reasons germane to the opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014).

20 **1. Examining Medical Source Julie L. Milasich, O.T.**

21 Occupational therapist Ms. Milasich performed a Functional Evaluation in November
 22 2015, and opined Plaintiff could sit three hours, stand one hour, and walk half an hour per day.
 23 Tr. 897-98. She opined Plaintiff could lift a maximum of 12.5 pounds. Tr. 897. The ALJ gave
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1 “minimal weight” to Ms. Milasich’s opinions based on conflict with the medical evidence and
2 Plaintiff’s activities. Tr. 1100.

3 The ALJ found Ms. Milasich clinical findings of mild leg weakness, rated at 4 to 4+ out
4 of 5, conflicted with contemporary medical evidence of normal strength. Tr. 1100. Treatment
5 providers found Plaintiff’s lower extremity strength “intact” or within normal limits. *See, e.g.*,
6 Tr. 935, 943. There is no indication these general findings of full strength are inconsistent with
7 Ms. Milasich’s more detailed and precise testing results of nearly full strength. Similarly, the
8 ALJ failed to explain how Ms. Milasich’s findings of “mostly intact sensation in [Plaintiff’s]
9 hands” was inconsistent with other medical evidence of normal sensation. Tr. 1100. The ALJ’s
10 finding of inconsistency with medical evidence was unsupported by substantial evidence, and
11 thus could not provide a germane reason to discount Ms. Milasich’s findings.

12 The ALJ found Ms. Milasich’s opinions inconsistent with Plaintiff’s activities as a
13 “primary caregiver for her ailing mother and four children, which involves driving and
14 household chores.” Tr. 1100. The ALJ failed to explain how these activities were inconsistent
15 with Ms. Milasich’s opinions, and no inconsistency is apparent. For example, the ALJ did not
16 identify any household chores that required lifting more than 12.5 pounds, or any driving that
17 required more than half an hour at a time or three hours per day. *See* Tr. 897. The ALJ’s finding
18 of inconsistency with Plaintiff’s activities was unsupported by substantial evidence, and thus was
19 not a germane reason to discount Ms. Milasich’s opinions.

20 The Court concludes the ALJ erred by discounting Ms. Milasich’s opinions.

21 **2. Treating Physician Kamran Khan, M.D.**

22 Plaintiff contends the ALJ erred by discounting Dr. Khan’s 2020 opinion. Dkt. 18 at 16.

23 In June 2020, Dr. Khan filled out a Request for Medical Opinion form, opining Plaintiff’s pain
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1 would interfere with concentration about half the time, she would need unscheduled breaks due
2 to pain, and she would need to recline about two hours per day. Tr. 1745-46. Dr. Khan opined
3 Plaintiff could use her “hands and arms less than occasionally” and would be absent at least three
4 days per month. Tr. 1747.

5 The ALJ gave Dr. Khan’s opinions “minimal weight” for several reasons. Tr. 1101. The
6 ALJ discounted Dr. Khan’s opinions because of normal mental status findings and reliance on
7 Plaintiff’s self-reports, but Dr. Khan’s opined limitations were based on pain, not psychological
8 impairment. Tr. 1101, 1745-47. The ALJ also discounted Dr. Khan’s opinions because they
9 were based on Ms. Milasich’s functional evaluation. Tr. 1101. Because the ALJ erred by
10 discounting Ms. Milasich’s opinions, reliance on them was not a valid reason to discount Dr.
11 Khan’s opinions.

12 The ALJ discounted Dr. Khan’s opinions as inconsistent with the medical evidence. The
13 ALJ noted Dr. Khan observed “some areas of tenderness and limited range of motion,” but also
14 sometimes “intact spinal range of motion” and “normal sensation, negative [straight leg raises],
15 no spasms, and no acute distress.” Tr. 1101. The ALJ did not identify any contradiction with
16 Dr. Khan’s opinions. Merely listing some normal and some abnormal findings does not explain
17 why the ALJ considered the normal results more significant. *See Reddick*, 157 F.3d at 725 (“The
18 ALJ must do more than offer his conclusions. He must set forth his own interpretations and
19 explain why they, rather than the doctors’, are correct.”). As a medical professional, Dr. Khan
20 was better suited than the ALJ to evaluate the normal and abnormal findings to determine
21 Plaintiff’s functional limitations. Inconsistency with medical evidence was not a specific and
22 legitimate reason to discount Dr. Khan’s opinions.

1 The ALJ found Dr. Khan's opinions contradicted by Plaintiff's activities as a caregiver,
2 which involved "driving, attending appointments, and performing household tasks on a reliable
3 basis." Tr. 1101. The ALJ failed, however, to explain how these activities conflicted with Dr.
4 Khan's opinions. Conflict with activities was not a specific and legitimate reason to discount Dr.
5 Khan's opinions.

6 The Court concludes the ALJ erred by discounting Dr. Khan's opinions.

7 **3. Non-examining Physician Frank Barnes, M.D.**

8 At the 2018 hearing, Dr. Barnes testified Plaintiff could lift ten pounds occasionally and
9 could stand/walk two hours per day. Tr. 1345. He opined she could handle and finger frequently
10 with the left and occasionally with the right upper extremity. Tr. 1346. The ALJ gave these
11 opinions "minimal weight" because Plaintiff worked with the same impairments. Tr. 1102. As
12 discussed above with regard to Plaintiff's testimony, this finding is unsupported by substantial
13 evidence. Records the ALJ cited show Plaintiff's pain worsened around the time of her alleged
14 onset date. *See, e.g.*, Tr. 794 (in June 2016 back pain had been "gradually worsening" for
15 "several months").

16 The Commissioner contends the ALJ found "sustained control" of pain undermined Dr.
17 Barnes' opinions. Dkt. 22 at 6; *see* Tr. 1102. Yet, elsewhere in the decision, the ALJ found
18 Plaintiff sometimes had "well-controlled pain" and sometimes had "uncontrolled back pain." Tr.
19 1096. It is the ALJ's role to resolve conflicts in the evidence. *Andrews v. Shalala*, 53 F.3d 1035,
20 1039 (9th Cir. 1995). Because the ALJ failed to resolve whether Plaintiff's pain was consistently
21 controlled or changed over time, sustained control of pain was not a valid reason to discount Dr.
22 Barnes' opinions.

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1 The ALJ also discounted Dr. Barnes' opinions based on the same medical evidence as for
 2 Dr. Khan. Tr. 1102. For the same reasons, this was not a valid reason to discount Dr. Barnes'
 3 opinions.

4 The Court concludes the ALJ erred by discounting Dr. Barnes' opinions.

5 **4. Non-examining State Agency Physician Myung A. Song, D.O.**

6 In November 2015, Dr. Song opined Plaintiff could perform light work. Tr. 197-99. The
 7 ALJ gave Dr. Song's opinions "significant weight" as consistent with Plaintiff's "work history,
 8 activities since April 2014, longitudinal examination findings, and pursuit of treatment," but did
 9 not identify any specific supporting evidence. Tr. 1102. As discussed above, several of the
 10 ALJ's findings regarding Plaintiff's work history, activities, and medical evidence were not
 11 supported by substantial evidence, and the lack of treatment after 2017 did not shed light on
 12 Plaintiff's condition before then. On remand, the ALJ's reassessment of this evidence will
 13 necessitate reconsideration of Dr. Song's opinions. The ALJ will also need to determine how
 14 reevaluation of the medical opinions discussed above that conflict with Dr. Song's affect the
 15 evaluation of Dr. Song's opinions.

16 **C. Step Five Jobs**

17 Plaintiff contends the three jobs the ALJ relied on at step five are incompatible with the
 18 RFC the ALJ assessed, according to either vocational expert testimony or the Dictionary of
 19 Occupational Titles (DOT). Dkt. 18 at 3-5. Because the ALJ must reevaluate portions of
 20 Plaintiff's testimony as well as several medical opinions inconsistent with the assessed RFC, on
 21 remand the ALJ may assess a different RFC and will have the opportunity to elicit further
 22 vocational expert testimony and address any apparent discrepancies with the DOT. The Court
 23 therefore need not address Plaintiff's argument at this juncture.

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1 **D. Scope of Remand**

2 Plaintiff requests remand for an award of benefits because it has been over five years
 3 since she applied for benefits. Dkt. 18 at 17. However, remand for an award of benefits “is a
 4 rare and prophylactic exception to the well-established ordinary remand rule.” *Leon v. Berryhill*,
 5 880 F.3d 1041, 1044 (9th Cir. 2017). It requires establishing that the ALJ failed to provide
 6 legally sufficient reasons for rejecting evidence, that the record is fully developed and no
 7 conflicts remain for the ALJ to resolve, and that, if the improperly discredited evidence were
 8 credited as true, the ALJ would be required to find the claimant disabled on remand. *Garrison*,
 9 759 F.3d at 1020. The length of time since Plaintiff applied for benefits does not establish any of
 10 these three criteria. The Court concludes remand for further proceedings is appropriate.

11 **CONCLUSION**

12 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
 13 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C.
 14 § 405(g).

15 On remand, the ALJ should reevaluate Plaintiff’s physical symptom testimony through
 16 2017 and the opinions of Ms. Milasich, Dr. Khan, Dr. Barnes, and Dr. Song; reassess the RFC as
 17 appropriate; and proceed to step five as necessary.

18 DATED this 9th day of September, 2021.

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21 RICARDO S. MARTINEZ
 22 CHIEF UNITED STATES DISTRICT JUDGE
 23

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